

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BYUNG HOON CHUNG, individually; DUK) Case No. 07-5554 SC
9 BONG CHUNG, individually; MYUNG BIN)
CHUNG, individually; KUO CHUL)
10 CHUNG, individually; on behalf of) ORDER GRANTING
themselves and all others similarly) DEFENDANTS' MOTION TO
11 situated,) DISMISS

12 Plaintiffs,)
13 v.)

14 MICHAEL MUKASEY, Attorney General)
of the United States; DEPARTMENT OF)
15 HOMELAND SECURITY; MICHAEL)
CHERTOFF, Secretary of DHS; and)
16 DOES 1 through 20, inclusive,)

17 Defendants.)
18)

I. INTRODUCTION

21 This matter comes before the Court on the Motion to Dismiss
22 ("Motion") filed by the defendants Michael Mukasey, the Department
23 of Homeland Security, and Michael Chertoff (collectively the
24 "Government"). Docket No. 9. The plaintiffs Byung Hoon Chung,
25 Duk Bong Chung, Myung Bin Chung, and Kuo Chul Chung (collectively
26 "Plaintiffs") filed an Opposition and the Government submitted a
27 Reply. Docket Nos. 17, 19. For the following reasons, the
28 Government's Motion to Dismiss is GRANTED.

1 **II. BACKGROUND**

2 Plaintiffs, a family, are natives and citizens of South
3 Korea. Byung Hoon Chung entered the United States with his wife
4 and children in 1992 on a tourist visa and subsequently obtained
5 alien registration cards ("green cards") for himself, his wife,
6 and their two children, thereby becoming legal permanent
7 residents. Unbeknownst to Plaintiffs, however, the green cards
8 they obtained had been fraudulently issued by Leland Sustaire,
9 who, at that time, was an employee of the Immigration and
10 Naturalization Service ("INS") and was using his government
11 position to sell fraudulent green cards. A detailed examination
12 of Sustaire's fraudulent scheme may be found in Shin v. Mukasey,
13 519 F.3d 901, 904 (9th Cir. 2008), and Hong v. Mukasey, 518 F.3d
14 1030, 1032-33 (9th Cir. 2008).

15 Although Sustaire destroyed the government files relating to
16 those aliens to whom he had sold fraudulent green cards, he made
17 and kept for himself a list of those who had obtained unwarranted
18 changes in their status. See Hong, 518 F.3d at 1033. After the
19 Department of Justice began investigating Sustaire, he eventually
20 turned this list over to the prosecutors in an attempt to gain
21 leniency. Id. Plaintiffs were allegedly on this list and, as a
22 result, Immigration and Customs Enforcement ("ICE," formerly the
23 INA) placed Plaintiffs in removal proceedings. On April 20, 2005,
24 an Immigration Judge ("IJ"), following a hearing, ordered
25 Plaintiffs removed from the United States because Plaintiffs were
26 not in possession of valid documents that would allow them to
27 remain in the country. Olsen Decl., Docket No. 10, Ex. A, Oral
28

1 Decision of IJ ("Removal Order"), at 4.

2 The Board of Immigration Appeals ("BIA") affirmed the IJ on
3 March 9, 2006. Id. Ex. B. Plaintiffs then filed a petition for
4 review in the Ninth Circuit. Oral argument was heard on June 15,
5 2007. Olsen Decl. Ex. C. After oral argument and while the case
6 was still pending before the Ninth Circuit, Plaintiffs, on
7 November 16, 2007, filed the present action in this Court. See
8 First Am. Compl. ("FAC"), Docket No. 3. Plaintiffs' FAC raised
9 essentially the same arguments that were raised in their petition
10 for review by the Ninth Circuit. In their FAC, Plaintiffs allege
11 that the Government should be prevented from removing Plaintiffs
12 because of equitable estoppel, unclean hands, and laches, and that
13 Plaintiffs' Due Process rights were violated. FAC ¶¶ 35-62. In
14 addition, Plaintiffs' FAC was drafted as a class action with
15 putative classes consisting of other aliens who unknowingly
16 purchased fraudulent green cards from Sustaire. Id. ¶ 28.

17 On May 13, 2008, in an unpublished opinion, the Ninth Circuit
18 denied Plaintiffs' petition. See Chung v. Mukasey, No. 06-71728,
19 2008 WL 2037715, at *1 (9th Cir. May 13, 2008) (unpublished). In
20 that decision, the Ninth Circuit specifically rejected Plaintiffs'
21 Due Process and estoppel claims. Id. The Government now moves to
22 dismiss Plaintiffs' action pending before this Court.

23

24 **III. LEGAL STANDARD**

25 A Rule 12(b)(6) motion to dismiss tests the sufficiency of
26 the complaint. Dismissal pursuant to Rule 12(b)(6) is appropriate
27 if the plaintiff is unable to articulate "enough facts to state a
28

1 claim to relief that is plausible on its face." Bell Atl. Corp.
2 v. Twombly, 127 S. Ct. 1955, 1974 (2007). For purposes of such a
3 motion, the complaint is construed in the light most favorable to
4 the plaintiff and all properly pleaded factual allegations are
5 taken as true. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969);
6 Everest & Jennings, Inc. v. Am. Motorists Ins. Co., 23 F.3d 226,
7 228 (9th Cir. 1994). All reasonable inferences are to be drawn in
8 favor of the plaintiff. Id. Unreasonable inferences or
9 conclusory legal allegations cast in the form of factual
10 allegations, however, are insufficient to defeat a motion to
11 dismiss. W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir.
12 1981).

13

14 **IV. ANALYSIS**

15 **A. REAL ID Act of 2005**

16 As an initial matter, Plaintiffs' action in this Court is
17 barred by the REAL ID Act of 2005 ("the Act"), Pub. L. No. 109-13,
18 Div. B., 119 Stat. 231 (May 11, 2005). The Act eliminated
19 district court review of removal orders and vested jurisdiction
20 for such review exclusively in the courts of appeals. See
21 Martinez-Rosas v. Gonzales, 424 F.3d 926, 928-29 (9th Cir. 2005)
22 (stating "under the new judicial review regime imposed by the Act,
23 a petition for review [in the courts of appeals] is now the
24 exclusive means for challenging final removal orders by the BIA .
25 . . .").

26 **B. Ninth Circuit Has Already Adjudicated Plaintiffs' Claims**

27 Even if this Court were to have jurisdiction to entertain
28

1 Plaintiffs' action, it would be precluded from doing so, as the
2 Ninth Circuit has already adjudicated these claims. See Chung,
3 2008 WL 2037715, at *1 (stating "[b]ecause the finding of
4 removability was based on sufficient evidence, and because the
5 Chungs allege no other basis for a due process violation, their
6 argument that the immigration court may be estopped from
7 deportation for violations of due process . . . fails" and their
8 "argument that the government should be equitably estopped from
9 pursuing their removal is equally unavailing") (internal quotation
10 marks omitted). Although Plaintiffs' FAC included claims for
11 unclean hands and laches, these claims are merely repetitions of
12 Plaintiffs' claims for due process violations and estoppel, and
13 are therefore also barred by the Ninth Circuit's ruling in Chung.

14 Plaintiffs alerted this Court to the fact that a petition for
15 rehearing en banc has been filed in Chung. Contrary to
16 Plaintiffs' assertion, however, the fact that a petition for
17 rehearing has been filed does not alter the precedential value of
18 a decision that has not been withdrawn.

19

20 **v. CONCLUSION**

21 For the foregoing reasons, Defendants' Motion to Dismiss is
22 GRANTED with prejudice.

23

24 IT IS SO ORDERED.

25

26 Dated: July 21, 2008



27

28

UNITED STATES DISTRICT JUDGE